

AMERICAN ARBITRATION ASSOCIATION

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In the Matter of the Arbitration between:

**FRATERNAL ORDER OF POLICE,
LODGE No. 5**

-AND

**AWARD AND
OPINION**

CITY OF PHILADELPHIA, PA

Docket No. 14-390-01918-10
(Sgt. Tyrone Cook – dismissal)

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BEFORE: ERNEST WEISS, ARBITRATOR

APPEARANCES: For the Union: Marc L. Gelman, Esq.
Jennings Sigmond, P.C.

For the City: Toi Shields, Esq.
Senior Attorney,
City of Philadelphia

Issue: Was Sgt. Cook discharged for just cause and if not, what shall be the remedy?

PRELIMINARY STATEMENT

Having been selected in accordance with the provisions of the collective bargaining agreement (CBA) between the above parties, I conducted an arbitration hearing on September 26, 2011 and was continued on October 14, 2011, at the offices of the American Arbitration Association at 230 S. Broad Street in Philadelphia, at which time the parties were afforded a full opportunity to present evidence and argument in support of their respective positions.

BACKGROUND

The City of Philadelphia has a bargaining relationship with the Fraternal Order of Police Lodge #5 ("FOP" or "the Union,"), and are parties to a CBA.(J-1) The parties are subject to the Disciplinary Code (J-2). The Notice of Discipline and Notice of Intent to Dismiss was submitted as (J-3). The joint exhibits were placed into evidence at the time of the hearing at the Arbitrator's suggestion.

Mr. Cook was dismissed on a Commissioner's Direct Action (CDA) on November 1, 2010 as a result of the following alleged violations of the Disciplinary Code

- Section 1.00 (Conduct Unbecoming an Officer - unspecified) in that he requested and received overtime (OT) pay when not working;
- Section 1.15 (Knowingly and willfully making a false entry in any Departmental report or record) having made false entries on Daily Attendance Reports (DARs) and receiving overtime compensation for hours before and after tours of duty, when he was not present at work;
- Section 4.15 (Failure to properly supervise subordinates; or to prefer disciplinary charges; or to take appropriate disciplinary action) by reason of failing to supervise officers and earning overtime for execution of warrants

when he was, in fact, absent from the assignment; and receiving overtime for accompanying officers transporting a prisoner, when he was not present.

- Sgt. Cook was also found to have violated Section 5.33 (Tardiness), in that Internal Affairs (IA) surveillance on 38 days showed that he either arrived late for his shift or left early and requested and received overtime on those dates, and/or failed to “cover” the tardiness with sick leave, vacation or holiday time.

In essence, he was dismissed for just cause for “stealing time,” and “failure to supervise.” The FOP submitted a grievance, claiming that no just cause for the termination existed, and requested reinstatement to his former position and to be made whole by the Arbitrator.

Since the parties were unable to resolve the grievance at the lower levels of their grievance procedure, the dispute came before me for final and binding resolution in accordance with the provisions of the CBA between the above parties and according to the rules of the American Arbitration Association.

CONTENTIONS OF THE CITY

The City argued in relevant part that, having committed the above violations, the grievant was dismissed with just cause and that the “punishment fits the crime” due to the serious and repeated nature of the violations. The City offered the testimony of the following seven witnesses to support its position: (1) Det. Nancy Radaszkiewicz, an Internal Affairs detective, formerly assigned to the Integrity Management Police Anti-Corruption Team (I.M.P.A.C.T), a section that has since been disbanded; (2) Sgt. Stephen Corso, also an investigator with IA; (3) P.O. K [REDACTED] M [REDACTED], one of the officers assigned to transport a prisoner from Williamsport to Philadelphia on an occasion when Mr. Cook requested overtime for accompanying and supervising the transport, and in the execution of two search warrants on another occasion when Mr. Cook sought overtime for accompanying

and supervising the execution of the warrant; (4) Lt. R [REDACTED] J [REDACTED], who supervised the execution of warrants purportedly supervised by Sgt. Cook; (5) Corp. Robert Warner, a technical supervisor in the IA Bureau; (6) Capt. M [REDACTED] D [REDACTED], a police advocate assigned to the Police Board of Inquiry, and (7) Police Commissioner Charles Ramsey, who ultimately took the direct action in dismissing Mr. Cook. What follows is a summary of the testimony of each witness.

Det. Nancy Radaszkiewicz testified that she was assigned to investigate an anonymous complaint letter against Sgt. Cook. She stated that such investigations were a regular part of her responsibilities at the time. She described the methodology in pursuing the investigation as including review of particular DARs and search warrant information, and ordering surveillance which was carried out, and resulted in reports that she reviewed. She stated that she participated in only a portion of the investigation, and that when she was reassigned, her partner, Sgt. Corso, took over the Cook investigation.

She testified that after she compared the surveillance reports with the DAR summaries, she determined that Sgt. Cook requested and received OT pay when arriving at work more than 15 minutes after his shift began (8 a.m. – 4 p.m.) and left early (before 4 p.m.) She stated that she also interviewed several detectives who were unable to recall whether or not Mr. Cook was present on certain dates. She stated that only supervisors had access to and could input data into the DAR system, and as part of their responsibilities, inputted the subordinates' time, as well as their schedules. She conceded that the mechanics of inputting the DAR data may differ from unit to unit within the Police Department.

Although she did not work on the assignment to its completion, her conclusions were based on comparisons of the logs, the video and still photos taken during the course of the surveillance.

She and Sgt. Corso prepared a summary of the data shown in the surveillance reports, for the express purpose of its use in the arbitration. She referred to the summary when testifying to examples of inconsistencies between the times entered on the DARs for Mr. Cook and the times recorded by surveillance. She pointed, by way of example, to November 8, 2004 when Cook was arrived at work at 7:50 a.m. for his regular 8 a.m. – 4 p.m. shift, and the DAR showed overtime from 6:15 a.m. – 8 a.m. on that date. On March 22, 2005, he arrived at work at 8:34 a.m. and did not deduct any time for lateness. Three days later, on March 25, 2005, he arrived at work at 8:54 a.m. for his regular shift, and failed to deduct the 54 minutes from his time. On July 25, 2005, he reported to work at 6:21 a.m., but put in for overtime from 6 a.m.

Sgt. Stephen Corso testified that he was currently assigned to the IA Bureau and had thirty years with the Philadelphia P.D. He stated that his responsibilities were to investigate complaints against police officers, particularly corruption investigations.

When describing the DAR entry system, he explained that work may be entered into the system in advance of the date that it is actually performed, but must be “certified” following the actual work day before the system closes for the day in question. In further discussion of the DAR system, he stated that it was possible to update or correct the pre-printed sheets that reflect the hours of work of each member of the police staff, which would be followed by a certification, and the document would then be transmitted digitally to the finance department. The updating and certification of the updating must be completed by a certain hour the following day.

He testified that when he assumed responsibility for the Cook investigation, he reviewed what Det. Radaszkiewicz had done, and he and Det. Radaszkiewicz conducted a number of interviews together, and interviewed Mr. Cook with respect

to two specific entries that he had questions about. He testified that Mr. Cook requested and received overtime for a prisoner transport when he was not present. He testified that he reviewed a 3-page audit trail document that had only recently been prepared, reviewing the entries on May 17, 2004. The document set forth who made the DAR entry, who updated it and who certified the entries for each date. According to the document, he indicated that another sergeant, Sgt. C [REDACTED] had made the initial entry on May 12th, in advance of work performed on May 17th. On May 17th, it was updated by Mr. Cook, putting in for overtime from 6 a.m. – 8 a.m. The following morning, within the window of time when DAR entries could be made or corrected for the previous day, Mr. Cook certified the entry and updated it again, putting himself down for an additional hour and a half overtime at the end of the day.

When Sgt. Corso further investigated Mr. Cook's work day of May 17, 2004, he interviewed Officers M [REDACTED] and M [REDACTED], as well as Mr. Cook, and determined that Cook did not transport the prisoner, and that Lt. J [REDACTED] was called in to supervise the transport.

He went through a similar exercise for the work day of August 18th, when Mr. Cook put in for overtime for supervising the execution of two search warrants at a private residence. Again, it was determined that although he requested and received overtime pay for that work, he was not present when the search warrants were executed, and another supervisor was called in.

Sgt. Corso testified that if a correction to the DAR needed to be made after the entry time had passed, it would be necessary to prepare a memo which would go through the chain of command, and ultimately go to finance, and any correction in pay would be made two or three months later. He also testified that the DAR system required an entry code for each overtime entry, identifying the nature of the

work or the case number worked on. The only exception was a 31 code, which referred to administrative or clerical work.

P. O. K [REDACTED] M [REDACTED] testified that he and Officers M [REDACTED] and W [REDACTED] worked on the prisoner transport from Williamsport to Philadelphia in 2004, and that Mr. Cook did not take part in that transport. M [REDACTED] further testified that on August 18, 2004 he participated in the execution of a search warrant, and that Mr. Cook did not participate in the supervision and execution of the search warrant on that date.

Lt. R [REDACTED] J [REDACTED] testified that he was a lieutenant in the northeast detective division. He stated that on August 18, 2004 he supervised the execution of two search warrants after he was contacted by one of the officers advising him that they did not have a supervisor. He stated that Mr. Cook was not present when the search warrants were executed.

Corp. Robert Werner, assigned to the IA Bureau, participates in and supervises a team doing "technical work" handling audio and video equipment for covert investigations. He testified that he had been in the unit for twelve years. Some of his work involved supervising a team in the field. The Cook surveillance covered arrival times at work and departure times from home, and lasted for a few weeks. He recalls the surveillance as being mostly consecutive days. The surveillance team videoed Cook's departure from home and arrival at work, and the tapes for the various days were consolidated onto a single disc. Portions of the video were shown and explained by Werner. Additionally, he stated that Sgt. Corso had asked him to prepare a second video August 11 and 12, 2005, but he had no knowledge as to why those particular dates were isolated. Further, surveillance consisted of video, still photos, and in some instances surveillance logs without accompanying photos or video. Although the logs should be consistent with the

time stamp on the videos or photos, there were instances where there were slight inconsistencies, which Werner could not explain.

Capt. M [REDACTED] D [REDACTED], Police Department Advocate for the Police Bureau of Inquiry, next testified. He stated that his responsibility is to run the Unit in which police officers who plead not guilty to charges have a hearing. He stated that he was assigned as a lieutenant in November 2009 and didn't remember exactly when Cook's case arrived, but that there was a 60-70 case backlog when he first arrived at the unit. He did know that the investigation was complete and ready for hearing.

He stated that because he was a novice without legal training and effectively learning on the job when he was first assigned to the Police Bureau of Inquiry, in the beginning he processed cases that didn't appear to be very complex. He stated that initially he was only processing about ten cases per month. At first, he concluded that the Cook case was too complex for him to handle. Ultimately, the Cook case, along with one or two others, was referred directly to the Police Commissioner without a hearing for direct action.

He further testified that the order of prosecution was at his sole discretion, and not according to any schedule. Other than the degree of complexity, the order of prosecution is based mostly on availability of everyone necessary, with no one out on sick leave, vacation, etc. He stated that the "charging unit" now brings in about twenty cases a month, so that the backlog has increased to about 104 cases. When asked what standard(s) were used to determine which cases were handled as a Commissioner Direct Action, he pointed out that every case was different and these happened to involve overtime, and questionable DAR activity.

Police Commissioner Charles H. Ramsey was the City's first witness on the second day of the hearing. He stated that he has been the Police Commissioner for

three and a half years, since January 7, 2008, and has been in law enforcement since December 1968.

He testified that he had dismissed other police officers for similar infractions – theft. He had, in fact, dismissed two others that week for similar reasons. He stated that there was no requirement that there be a pattern of abuse – that a single violation was sufficient – that integrity could not be compromised.

He conceded that he did not see the videotapes, that Cook's twenty-seven years on the force did not enter into his decision, and that he did not take into account how such violations were dealt with prior to his tenure. **He denied having any knowledge as to the mechanics of how an internal affairs packet gets to his desk for review.**

CONTENTIONS OF THE GRIEVANT

Mr. Cook was the only witness on behalf of the grievant. In summary, it was his position he did, in fact, work all of the overtime he put in for, but because of the constraints of the DAR system, he was often unable to enter the OT prior to 11 a.m. the day after the OT was worked, and that it was the general practice throughout the department to simply put in for OT the following day. He contends that his OT was approved by his superior officers, and that he entered it in this way at their verbal direction, but no written authorization. He also contends that because the case involved alleged infractions from 2004 and 2005, and it was not brought to his attention until 2010, he could not possibly remember and defend against claims that occurred more than five years prior to the date of his firing.

The FOP argued that even if the allegations were correct, that the Police Commissioner's penalty was inconsistent with past practice, where officers received penalties short of dismissal.

He testified that he had been a police officer for twenty-seven years and had been a sergeant for eleven years. His last date of employment was October 10,

2010 when he was notified of his termination. He stated that previously, he had been suspended for an off-duty charge of driving under the influence, but was reinstated with full back pay pursuant to an arbitration award, following a successful rehabilitation. He stated that at the time he was reinstated in 2009, no one ever mentioned that there had been a pending investigation or charges dating back to activities in 2004-5.

He stated that it was his responsibility to enter overtime, sick leave, vacations and holidays on the DARs of the Captain and Lieutenant. Although by Policy this duty was the Lieutenant's, it had been delegated to him by Lieutenants C [REDACTED] and/or K [REDACTED].

He was assigned to the Five Squad and worked the 8-4 shift. He entered overtime for the Lieutenant, for the detectives in the squad which he approved, and, when approved by the Lieutenant, for himself. Approval for his overtime came from the Captain or Lieutenant, who would indicate that they would be staying after 4 p.m. and would request that he stay late to work with them. Such approval was always verbal, and the overtime was always entered on the DAR, through the computer system after the overtime was worked. He testified that supervisors had access to the DAR system, but the pass code, although not allowed by policy, could be given to others.

Cook testified that sometimes overtime was submitted on a permission slip, but that this was not required. He further testified that although one was supposed to put in a slip to get paid the overtime, it was not always done that way. Further, he clarified that in order to get overtime pay the time involved had to be a half-hour or more, and had to be entered before the system closed for the day, which in their case was at 11 a.m. the following day. He stated that if the "window" was missed, one would put in for overtime for another date, since the pay was due the police officer. His contention was that the practice was in use throughout the City,

even though the Policy requires a written memo requesting and explaining the circumstances of the overtime and moving up the chain of command. If payment was requested by memo, it would take two to three months to receive the payment. He stated that he used that practice for himself, the Lieutenant, and Captains E [REDACTED] and K [REDACTED].

He testified that sergeants were not authorized to use Code 31 – the code for administrative work – for overtime, and consequently was told to simply use an existing incident or complaint number and attach it to his overtime request.

He stated that he was never counseled, warned or received a memo about lateness. In fact, he got a commendation letter for each of 26 years for perfect attendance.

He acknowledged that a supervisor was supposed to be present when search warrants were executed, and that he was not present when the two search warrants were executed on August 18, 2004. However, he explained that Capt. K [REDACTED] directed him to stay in the office instead, since they were working on crime statistics that were currently required. When asked why he claimed overtime for that day, he replied that he had been at work before his shift began and had used the codes because the Captain instructed him to do so; he claimed he had been called before 6 a.m. Further, he stated that this was exactly what he had told the IA investigator. Cook denied that this represented a falsification of documents, since he was following the Captain's orders. Cook testified that he and the Captain were neighbors and close friends. When asked if he performed work even if it was in violation of policy, he replied that he was obliged to follow the Captain's orders. There is no evidence that the Captains had been interviewed by an IA investigator, and neither Captain was called as a witness in this proceeding.

When asked why he hadn't used the COMPSTAT code for the overtime instead of falsifying the record, he stated that he simply didn't remember, and

really couldn't be expected to remember ordinary events that took place six years ago. Similarly, he could not address the issue of not covering lateness with sick time, holiday time or vacation time on ordinary incidents that took place five or six years before, and that no one should be expected to recall such events.

When asked to account for the overtime he took when the surveillance showed him arriving for work at 7:50 a.m. (8-4 shift) on November 8, 2004, while the DAR shows overtime from 6:15 a.m. – 8 a.m., he again asserted the unfairness of having to remember such a detail on a specific date six years prior. Likewise, he stated that he could not account for failure to cover 34 minutes of tardiness where the surveillance showed him arriving at 8:34 a.m. on another date. He stated that the Lieutenant didn't take the time away from him, so he didn't either. He made similar responses with reference to time on March 24 and March 25, 2005, and made no response to an inquiry about having requested and received overtime on July 25, 2005 when he arrived 41 minutes late.

As to the prisoner transport on May 14, 2005, he acknowledged that IA was correct that he got overtime for that day, even though he was neither assigned to or went on the transport. Here again, he had worked additional hours with the Captain, who didn't have a problem with his overtime. As to using the code numbers for this purpose, Cook testified again that this was a common practice.

His testimony specifically noted that he came to be on Five Squad – an elite squad – because he was expressly chosen by the Captain for his reliability and work ethic. Furthermore, there was a different attitude about time in the Five Squad, since police officers were needed to be flexible and were needed at different times than allowed for on traditional shifts.

DISCUSSION AND OPINION

The FOP called the case “peculiar” for two reasons:

1. The fact that the case involved alleged infractions that took place in 2004-4005; and
2. Cook appears to have been fired for being “sloppy” with details, after 27 years on the force.

It argued that the case presented by the City was circumstantial, and thus the appropriate standard of proof should at least be clear and convincing proof that Cook violated the Disciplinary Code, and that this standard has not been met. It reminded the Arbitrator that Cook was never counseled or warned, and was absolutely certain that no police officer was ever fired for lateness. It further called into question whether it was realistic to expect that a captain or a lieutenant would testify to allowing a subordinate employee to cut corners, or that such cutting of corners was the general practice in violation of direct policy.

In its closing statement, the City reiterated that the uncontested testimony of Det. Radaszkiewicz and Sgt. Corso, together with the surveillance conducted and supervised by Corp. Werner, it established that Mr. Cook took OT pay to which he was not entitled at the beginning of the shift on 38 occasions (confirmed by DARs), was late many times and didn't use sick leave, vacation or holiday time to cover, failed to supervise the execution of search warrants for which he requested and received overtime pay, and Lt. J. [REDACTED] had to be called to supervise the execution due to Cook's absence. He received overtime pay for a prisoner transport while not being in attendance, which was corroborated by P.O. M. [REDACTED]. Finally, Police Commissioner Ramsey testified that the severity of the infractions together with the pattern of abuse displayed an unacceptable lack of integrity. He pointed out that others were dismissed for similar infractions.

Mr. Cook testified and failed to give a valid explanation for his actions. Although he claimed that captains and lieutenants authorized his activities, neither was called by the grievant to testify on his behalf.

In sum, the City's position is that it has established just cause to dismiss Mr. Cook for stealing time, demonstrating that the behavior was neither inadvertent nor isolated. Finally, the discipline was proportionate, given the severity and frequency of the infractions.

While it may indeed be troublesome that this case involved violations of the Disciplinary Code that took place in 2004 and 2005, I am unaware of any provision of the contract, disciplinary code or statute that prohibits imposing discipline based on actions that are five or six years old.

The fact remains that having thoroughly considered all the evidence, including the arguments and allegations of both parties at the hearing, I find that the uncontroverted and overwhelming evidence supporting the Police Commissioner's Direct Action dismissal of Mr. Cook is sustained, the grievance is denied, and I make the following AWARD:

AMERICAN ARBITRATION ASSOCIATION

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In the Matter of the Arbitration between:

**FRATERNAL ORDER OF POLICE,
LODGE No. 5**

-AND

AWARD

CITY OF PHILADELPHIA, PA

Docket No. 14-390-01918-10
(Sgt. Tyrone Cook – dismissal)
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The undersigned arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above parties, and having duly heard the proofs and allegations of the parties, AWARDS as follows:

The discharge of Sgt. Tyrone Cook was for just cause.

The grievance is denied.


ERNEST WEISS, ARBITRATOR

STATE OF NEW JERSEY
COUNTY OF SOMERSET

On this 25th day of April, 2012, before me personally came and appeared Ernest Weiss, to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged that he executed same.

JILL E. FARKAS
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires May 3, 2009